

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
Notice of Inquiry into the need for an)	
expedited hearings process for)	
complaints against an alternative gas)	04-NOI-01
supplier where the complainant seeks)	
a cease and desist order under)	
Section 19-120 of the Public Utilities)	
Act)	

NOI ISSUES AND QUESTIONS

INITIAL COMMENTS OF THE CITIZENS UTILITY BOARD

1. **a. Is there a need for the Commission to implement an expedited process for complaints filed under Section 19-120 of the Public Utilities Act [220 ILCS 5/19-120] in which the complainant seeks a cease and desist order? Please provide specific examples of Section 19-120 docketed proceedings before the Commission in which the lack of an expedited process resulted in denial of the relief sought by the complainant.**

The Commission should implement an expedited process to handle Article 19 complaints. The Act gives the Commission authority to ensure that alternative suppliers adequately disclose prices, terms, and conditions of service in order to ensure that customers have the information necessary to make educated choices. 220 ILCS 5/19-115. Enforcement of this requirement protects both consumers and competitors, particularly in a developing market that can be very confusing for consumers. Moreover, while the Commission can fine a supplier for violating the Act, it cannot refund customers money if they suffer harm. The inability to refund customers increases the need to take swift action, as further discussed below.

The Commission should also consider the fact that the Act gives it specific authority to order an alternative to supplier to “cease and desist” its behavior. For this language to have any real effect, the Commission must act quickly. If a case takes several months to litigate, the damage may be done before the Commission orders a company to cease and desist. 220 ILCS 19-120(c)(1).

Recently, CUB has been involved in two proceedings that highlight the need for an expedited process. CUB filed a complaint under Article 19 against Peoples Energy Services Corporation on September 30, 2003. The Commission did not issue an Order until July 21, 2004. The delay in the PESCO case harmed consumers because by the time

the order came out, customers may have missed opportunities in the shopping cycle for the next winter (2004-2005).

The PESCO case is also relevant to the question of harm because the contract originally offered to customers created a loophole that put customers at considerable risk that the company could change the price of gas at any time for any reason. While PESCO voluntarily took steps to limit harm to customers by interpreting several sections in the offer in a customer friendly manner, the Commission should not assume that this would be the case in the future. The Commission should not wait for such an occurrence before setting up a process to reduce the chances of customer harm.

CUB also filed a complaint against Nicor Solutions, an affiliate of Nicor Gas, and Nicor Gas on January 15, 2004. The complaint asks the ICC to stop Nicor Solutions from marketing its Winter Cap program which promises to give consumers credits against their gas bills should gas prices rise above a certain level. The Winter Cap program solicitation does not clearly state several important terms such as what price consumers will pay for their gas or how likely they are to actually save any money. The solicitation also fails to adequately disclose that enrollment in Winter Cap automatically transfers ARG customers back to Nicor. The case has now been docketed for nearly nine months and has not progressed past the Motion to Dismiss stage. Without an expedited proceeding, Nicor Solutions will continue to collect fees from customers, who cannot receive a refund even if CUB ultimately prevails.

Nicor's actions highlight the need to develop a process whereby Motions to Dismiss are handled expeditiously. Assuming the Commission ultimately finds that Nicor has misled customers, it can fine the company, but it cannot force Nicor to refund money to customers. Hence, the way to protect customers is to act expeditiously, force the company to correct the violation, and allow customers to make an informed choice.

b. Should an "expedited" cease and desist process include an opportunity for "emergency" relief such as that which is available under Sections 13-514 and 13-515 of the Public Utilities Act when a competitive telecommunications carrier alleges that the anticompetitive actions of an incumbent carrier will cause irreparable harm to the complainant?

Sections 13-514 and 13-515 allow the Commission to grant emergency relief within two days of the filing of a complaint. CUB encourages the Commission to look to this section for guidance as it develops a process for Article 19 complaints. CUB believes that such quick action is equally as important for natural gas retail customers as it is for telecommunications wholesale customers. The premise should be protection of both end-users and competitors.

Emergency relief is appropriate given the nature of the natural gas market and the potential harm to customers and competitors. If the violation by the company is egregious and the harm to consumers is immediate and extreme, then the Commission should be able to act as quickly as necessary to protect consumers. Many consumers face

significant hardships when gas prices increase. For low and moderate-income customers on fixed incomes, if the price differences amount to hundreds of dollars over the course of a winter, the need for emergency protection speaks for itself.

c. Would the availability of an expedited or emergency cease and desist process under Article 19 be intended to prevent harm to competition in a manner similar to that provided in Section 13-515 of the Public Utilities Act? If so, please explain how a complaint *against* a competitive gas supplier is comparable to a complaint that is filed by a competitive telecommunications carrier against a noncompetitive carrier.

Conceivably, gas utilities could act in ways that harm competitors. They can cause switching delays or billing problems that deter customers from switching. However, the main reason CUB believes the Commission should implement an expedited process is to protect consumers. The telecommunications industries and gas industries are not comparable in terms of harm to consumers. The difficulties of making informed choices are much greater in the gas industry, and the harm to customers is potentially much greater.

In the gas industry the choices customers make can change their gas bills by hundreds of dollars in a heating season. The choices customers make can significantly affect their household budgets. Customer choice offers the promise of competitors offering customers lower prices, but to date there is no evidence that this is the case. In fact, CUB has seen providers, particularly utility affiliates, using questionable marketing tactics to attract customers to sign up for offers they do not understand. The Commission needs to take an aggressive approach to protecting consumers and the only way to do this is with an expedited process that penalizes suppliers that violate the rules.

The Commission should also consider that when a seller uses misleading or deceptive marketing to induce customers to sign up for a plan, the competitive market is harmed. Competition can only work if rules are fairly and equitably enforced. Delays may lead to competitors prematurely exiting the market because they cannot compete with offers that do not actually provide lower priced gas, but deceive customers in to purchasing a more expensive product.

d. What other purposes would be served by an expedited or emergency cease and desist process? For what other types of inappropriate activities could emergency cease and desist relief be requested? Is fraudulent marketing one such activity? Are there others? Should simply including the words “cease and desist” in a complaint be sufficient to initiate the emergency relief process and any deadlines associated with it?

There are two issues. First, should the default process be an expedited process with a shortened time frame, as compared to a rate case time frame that the rules were written to address? CUB believes the answer is yes. Second, should there be an

emergency process to grant immediate injunctive relief? Again, CUB believes the answer is yes.

An expedited process would serve to protect both consumers and competitors, and should be norm rather than the exception. Certainly the Commission must consider the question, “when is such a process appropriate?” However, the rights of all the parties – consumers, competitors, and suppliers – must all be considered. Current Commission procedures weigh heavily towards the rights of the providers. In Article 19 cases, justice delayed can certainly be justice denied.

Historically, in terms of procedure and time lines, the Administrative Law Judges at the Commission have acted conservatively, unless specifically directed otherwise. The judges depend on the administrative rules for guidance, and generally rely on the outer limits of the time frames. For example, the discovery rules provide for 28 days to respond to data requests and if that period is shortened at all, it is generally done so at the agreement of the parties. However, the current Commission rules were designed for a different time when the Commission presided over long arduous rate cases with multiple witnesses and large quantities of testimony. The cases at issue are consumer fraud cases with far fewer data requests, less work papers, etc. The default time for discovery needs to be shortened accordingly.

In setting the time frame for a case the Commission should create a list of factors to consider including:

- Amount of potential harm to consumers;
- Inequity to competitors;
- Timing of the offer in relation to the heating season; and
- Level of complication of the issues including:
 - How much discovery is needed?
 - Is written testimony needed?
 - Is a hearing needed?
 - Are briefs needed?

While the facts of the situation should dictate the time line, the Commission should develop guidelines that move cases to completion with three to four months of filing. Consideration should be given to abbreviate discovery, reduce testimony, and limit briefs. In some cases, it may not be necessary to hold a hearing, in others, it may not be necessary to submit briefs. If a party bringing the complaint needs a lengthy discovery period, then it has to allow for a longer time frame to complete the case. On the other hand, a supplier should not be allowed to stonewall in order to delay a proceeding.

CUB recognizes the rights of parties and the need for opportunity for a fair hearing. However, fairness to parties can be achieved without endless rounds of testimony and briefs.

e. If an expedited or emergency process were implemented, what standards would be applicable for granting emergency relief? Would a showing of irreparable harm and likelihood of success on the merits be required? Should anyone other than the entity being harmed be permitted to seek emergency relief?

As stated earlier, an expedited process should be standard. CUB recognizes that emergency relief should only be granted when circumstances warrant such relief. Standards for emergency relief must be in place to ensure fairness to the parties, and should include irreparable harm and likelihood of success on the merits. However, the Commission should not interpret “irreparable harm” so narrowly that it never applies.

f. Does the Commission have the statutory authority to require the posting of a bond by the person requesting the emergency relief? If the Commission has the authority, what factors would the Commission consider in setting the amount of the bond?

Section 13-515 appropriately addresses the issue of frivolous requests for emergency relief by competitors. Any consumer representatives bringing requests for emergency relief should not be subject to such penalties. There is no economic incentive for consumer representatives to bring a frivolous complaint and there is no evidence that this has ever been, or will be a problem. Consumer representatives practice before the Commission on a regular basis and understand the consequences of bringing a frivolous complaint.

2. In the absence of specific statutory authority mandating expedited proceedings, is there a statutory basis for expedited proceedings under Section 19-120 of the Public Utilities Act? Please provide specific citations to any relevant Sections of the Public Utilities Act and the Illinois Administrative Procedure Act.

The Commission has broad statutory authority to carry out its responsibilities. 220 ILCS 5/1-102. The gas companies in Illinois chose to open their service territories through Commission approved tariffs, rather than specific legislative authority corresponding to the Electric Service Customer Choice and Rate Relief Law of 1997. It would be inconsistent to now argue that the Commission has authority to grant the utilities’ request to open up the market to competition, but lacks authority to police that market. As the Appellate Court noted in *Abbott Laboratories v. Illinois Commerce Commission*, “[T]he express grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature’s objective.” *Abbott Laboratories v. Ill. Commerce Comm’n*, 289 Ill. App. 3d 705, 712 (1st Dist. 1997).

3. a. Will expedited proceedings afford all parties to a complaint proceeding sufficient due process?

Due process rights apply equally to both plaintiffs and defendants. The circumstances of the case often dictate what is appropriate in terms of due process. The Commission should not ignore complainant's right to have their complaint addressed in a timely manner that affords them real relief.

b. If an expedited or emergency process is implemented, what procedural steps would be appropriate to ensure that parties have a reasonable opportunity to participate and that an informed decision, based on evidence of record, can be reached? For example, should a reasonable opportunity for discovery be provided? Are some procedural steps required by statute or rule?

There are many ways to ensure parties have a reasonable opportunity to participate in a hearing. Of course, any decision reached by the Commission must be based on the record. The question is, how to create such record in a shorter time. Creating a record, and basing a ruling on evidence does not necessarily require a lengthy process. The Commission must take into consideration many factors, including the harm to customers and competitors that may be inevitable as a result of a lengthy process.

c. Would the expedited or emergency cease and desist relief be granted in an interim order? If so, is there a statutory basis for doing so?

While the Public Utilities Act does not give specific authority to grant interim orders, CUB submits that the Commission derives such authority from the general provisions of the Act.

4. If an expedited proceeding is necessary, identify any current Commission rules that would need to be amended to provide for such a proceeding.

CUB believes that the Commission can take steps to expedite a proceeding under the current rules. However, the current rules should be amended to clarify the Commission's expectations regarding how these cases should be handled.